IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

**THE HON'BLE THE CHIEF JUSTICE MR.H.L.DATTU**
**&**
**THE HONOURABLE MR. JUSTICE K.T.SANKARAN**

TUESDAY, THE 14TH AUGUST 2007 / 23RD SRAVANA 1929

**ST.Rev..No. 287 of 2003**
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*(TA.552/2002 of SALES TAX APPELLATE TRIBUNAL, ADDDL.BENCH,ERNAKULAM)*

PETITIONER/RESPONDENT/APPELLANT/ASSESSEE.
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JOHNY JOSEPH, M/S.J.J.ENTERPRISES,
ERNAKULAM.

BY ADV. SRI.RAJU JOSEPH
ADV. SRI.SUNIL SHANKER

RESPONDENT/ APPELLANT/RESPONDENT/REVENUE.
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STATE OF KERALA REP. BY
DEPUTY COMMISSIONER(LAW) COMMERCIAL TAXES,
ERNAKULAM.

BY SR. GOVERNMENT PLEADER SHRI MUHAMMED RAFIQ.

THIS SALES TAX REVISION HAVING BEEN FINALLY HEARD ON 14/08/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**H.L. DATTU, C.J. & K.T. SANKARAN, J.**

**.....**

**SALES TAX REVISION. No. 287 OF 2003**

**.....**

**Dated this the 14th August , 2007**

**O R D E R**

**H.L. Dattu, C.J.:**

This revision petition is filed questioning the legality or otherwise of the orders passed by the Sales Tax Appellate Tribunal in T.A.No. 552 of 2002 dated 29th April, 2003. The assessment year in question is 1988-89.

2. The assessee is engaged in the business of running a photo processing lab . According to the assessee, his activity is confined to taking of photographs of customers and delivering their photographs . This activity, according to the assessee, is a skilled labour, which is not exigible to tax.

3. The assessee had filed his annual returns before the assessing authority . The same is rejected by the assessing authority . After such rejection, the assessing authority had issued a pre-assessment notice, proposing certain turnovers to be exigible to tax under the Kerala General Sales Tax Act, 1963 (hereinafter referred to as 'Act'). The view of the assessing authority is that the activity of the assessee would come within the meaning of the expression “works contract” and accordingly, had levied tax on the taxable turnover of the assessee. Aggrieved by the said order, the assessee had carried the matter in an appeal before the first appellate authority. The first appellate authority had allowed the appeal and had issued certain directions to the assessing authority to re-do the assessment in

accordance with law and in accordance with the observations made in the course of the order.

4. After the disposal of the appeal, the assessing authority had passed yet another order. In the said order, the assessing authority had once again levied the tax under the Act, treating the activity of the assessee as "works contract", which is exigible to tax under the Act. This order of the assessing authority was the subject matter of the appeal before the first appellate authority and the first appellate authority had allowed the appeal of the assessee. Being aggrieved by the above said order, the State had carried the matter in appeal before the Salestax Appellate Tribunal in T.A.No. 552 of 2002. The Tribunal, by its order dated 29.04.2003, has rejected the appeal following the observations made by the Apex Court in **Associated Cement Companies Ltd. vs. Commissioner of Customs ([2001] 4 SCC 593)** . In the orders passed, the Tribunal had made the following observations:

> *"7. The first appellate authority has accepted the contention of the assessee and allowed the appeal for the five years on the following finding.*
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> *"The activity of the appellant is to develop and print out the exposed , film brought by the customer in the appellant's colour lab. It is commonly known that the photo prints supplied by the appellant to the customer are not saleable in the open market as the same has no value. The Supreme Court in the case of Asst. Sales Tax Officer and others vs. B.C. Kame ([1977] STC 237) held that when a photographer undertakes to take photographs develop the negative or do other photographic*

*work and thereafter supply the prints to the customers, he cannot be said to enter into a contract for sale of goods. On the contrary the contract is for use of skill and labour to bring out a desired results . The occupation of a photographer except in so far as he sells the goods purchased by him is essentially one of skill and labour. In the advanced technology the machine carry out the entire process by the help of a skilled person. Hence the colour photo printing is not a works contract but it involve essentially a labour and service."*

*8. But the contention of the revenue is that the decision in Rainbow Colour Lab's case has been overruled in Associated Cement Company Ltd. vs. Commissioner of Customs. There is some force in the contention of the revenue. In Associated Cement Company Ltd. Vs. Commissioner of Customs ([2001] 4 SC Case 593) the Honourable Supreme Court of India held as follows:*

*"The Forty Sixth Amendment was made precisely with a view to empower the State to bifurcate the contract and to levy sales tax on the value of the material involved in the execution of works contract, notwithstanding that the value may represent a small percentage of the amount paid for the execution of the works contract. Even if the dominant intention of the contract is rendering of a service which will amount to a works contract, after the Forty Sixth Amendment the State would now be empowered to levy Sales Tax on the material used in such contract. The conclusion arrived at the Rainbow Colour Lab case, in our opinion, runs counter to the express provision contained in Article 366 (29-A) as also of the constitution bench decision of this court in Builders Association of India vs. Union of India."*

*9. We now proceed to consider the question as to*

*whether the order of the 1st appellate authority directing to delete the levy of tax on the turnover involved in the works contract on the basis of the decision of the Rainbow Colour Lab case 118 STC 9 is liable to be interfered with. In Associated Cement Company's case ([2001] 4 SCC 593) the Honourable Supreme Court has categorically held that after the 46th Amendment of the Constitution the turnover representing works contract could be bifurcated so as to levy sales tax on the value of materials involved in the execution of works contract. In fact, the impugned order of the first appellate authority directing to delete the levy of tax on the value of materials involved in the activities of the assessee in the light of the decision in Rainbow Colour Lab's case is not sustainable, in so far as the decision in Rainbow Colour Lab's case has been overruled in Associated Cement Company case.*

*10. In the light of the decision of the Honourable Supreme Court in Associated Cement Company ([2001] 4 SCC 593), we hold that the assessing authority rightly levied tax on the service charge received from the colour photo printing by treating it as works contract. So, the 1st Appellate authority should not have interfered in the finding of the assessing authority. In the circumstances, we concur with the findings of the assessing authority and setting aside the order of the first appellate authority, the original assessment is restored."*

5. Aggrieved by the said order passed by the Tribunal, the assessee is before us in this Revision, filed under section 41 of the Act. The assessee has raised the following questions of law for our consideration and decision; they are as under:

*"A. Is not the Photographic work – taking photograph,*

*developing and printing films carried on by the assessee only a skilled labour inexigible to tax? Can this activity be termed as works contract and as a sequel assess such turnover to tax in the hands of the assessee especially in the light of the judicial pronouncements like 39 STC 237, 103 STC 360, 118 STC 9 etc.?*

*B. Is not the order of assessment in the instant case clearly barred by limitation?*

*C. Is not the proposal for levy of interest under Section 23(3) from the very end of the assessment year concerned unjust, improper and illegal ? Is not such a levy possible and permissible only with effect from the date of the Tribunal order with which only in any event liability to tax has been finally fastened on the assessee, on a true reading of Sect. 23(3) of the KGST Act?*

6. In so far as the questions of law B and C are concerned , the same was never urged or argued either before the assessing authority or before the Tribunal. Under section 41 of the Act, this Court can exercise its revisional powers, if the Tribunal has erroneously decided or failed to decide any questions of law.

7. The questions of law- B and C , formulated for our consideration and decision, were never urged or raised before the Tribunal . The Tribunal had no occasion to adjudicate those questions of law. In view of that, it cannot be said that the Tribunal had either failed to decide any questions of law or erroneously decided any questions of law . In that view of the matter, we do not intend to express any opinion on the questions of law- B and C raised by the Revision Petitioner in this Revision Petition.

8. In so far as the question of law-A is concerned, Shri Raju Joseph, learned counsel appearing for the petitioner would contend that the Tribunal was not justified in relying upon the observations made by the Apex Court in **Associated Cement Companies Ltd. vs. Commissioner of Customs ([2001] 4 SCC 593)** to come to the conclusion that the activity of the assessee is exigible to tax on the ground that the said activity is in the nature of a works contract. Learned counsel would further submit that the decision rendered by the Apex Court in **Rainbow Colour Lab vs. State of M.P. ([2000] 118 STC 9 [SC])** is not overruled by any subsequent decision by the Apex Court and therefore, the Tribunal was not justified in allowing the State 's appeals. In support of their contention, learned counsel relied upon the observation made by the Apex Court in **Rainbow Colour Lab vs. State of M.P. ([2000] 118 STC 9 [SC]).**

**9.** Per contra, learned counsel appearing for the Revenue, Shri Muhammed Rafiq, would submit that the decision of the Apex Court in **Rainbow Colour Lab '** s case was impliedly overruled by the Apex Court in **Associated Cement Companies Ltd. vs. Commissioner of Customs ([2001] 4 SCC 593)** and that decision of the Apex Court in **Associated Cement Companies '**s case has been confirmed by the Apex Court in **Bharat Sanchar Nigam Ltd. and another vs. Union of India and others ([2006] 145 STC 91).**

10. In **Rainbow Colour Lab's case**, the Apex Court was considering the provisions of the Madhya Pradesh General Sales Tax Act,

1958 and in that decision, the Apex Court has held that, unless there is a sale and purchase of goods, either in fact or deemed, and such sale is primarily intended and not incidental to the contract, the State cannot impose sales tax on a works contract simpliciter on the basis of the expanded definition found in Article 366 (29A) (b) of the Constitution and that the work done by the photographer is only in the nature of service contract, not involving any sale of goods. That was a decision rendered by two learned Judges of the Apex Court.

11. Subsequently, a three-Judge Bench of the Supreme Court in **Associated Cement Companies Ltd. vs. Commissioner of Customs ([2001] 124 STC 59)**, while considering the question whether drawings, designs, diskettes, manuals, etc., relating to machinery or industrial technology were 'goods' which could be subjected to customs duty on their transaction value at the time of their import, under the Customs Act, 1962 and the appellant's contention relying on several decisions relating to levy of sales tax, that in contracts for supply of services, there is no sale of goods and no customs duty could be imposed on the intellectual property which was obtained, considered in detail all the decisions including that in Rainbow Colour Lab ([2000] 118 STC 9), and held that even though the decisions relating to levy of sales tax would have no application to the case of levy of customs duty, the decision in **Rainbow Colour Lab** required consideration, that the Forty-sixth Amendment was made precisely with a view to empower the State to bifurcate the contract and to levy sales tax on the value of the

materials involved in the execution of the works contract, notwithstanding that the value may represent a small percentage of the amount paid for the execution of the works contract, that the conclusion arrived at in Rainbow Colour Lab ran counter to the express provision contained in Article 366 (29A) as also of the Constitution Bench decision of the Supreme Court in **Builders' Association of India vs. Union of India** ***([1989] 73 STC 370)***.

12. **Associated Cement Companies Ltd. v. Commissioner of Customs'** case, did not relate to sales tax, but to customs duty, and the question whether there is any sale of goods in a contract for supply of services, was specifically raised for consideration. The said question was specifically considered with reference to several decisions including the decision in Rainbow Colour Lab [2000] 118 STC 9(SC), in great detail and what was stated by the court was not intended to be a passing comment or casual observation. The Supreme Court categorically laid down the principle relating to works contract and held that the decision in Rainbow Colour Lab ran counter to the Constitution Bench decision in **Builder's Association** [1989] 73 STC 370 and article 366(29A) even though decisions relating to levy of sales tax had no application to the case that was being considered by it relating to customs duty. The enunciation of law and pronouncement by the three-Judge Bench of the Supreme Court in Associated Cements Companies Ltd.'s [2001] 124 STC 59 (SC), is law declared under article 141 and will

prevail over the principle laid down in the two-Judge Bench of the Supreme Court in Rainbow[2000] 118 STC 9 (SC).

13. By the aforesaid observation in ***Associated Cement Companies's*** Case, the three Judge Bench of the Supreme Court has impliedly overruled the observation made by the Apex Court in ***Rainbow Colour Lab's case*** .

14. In **Bharat Sanchar Nigam Ltd vs. Union of India,** the Supreme Court, at paragraphs 49 and 50 has observed as under:

> *"49. This conclusion was doubted in **Associated Cement Companies Ltd. vs. Commissioner of Customs** ([2001] 4 SCC 593) saying :*
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> *"The conclusion arrived at in Rainbow Colour Lab case ([2000] 2 SCC 385 ), in our opinion, runs counter to the express provision contained in Article 366 (29A) as also of the Constitution Bench decision of this court in Builders' Assn. of India vs. Union of India ([1989] 2 SCC 645)" .*
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> *50. We agree. After the 46th Amendment, the sale elements of those contracts which are covered by the six sub -clauses of clause (29A) of Article 366 are separable and may be subjected to sales tax by the States under entry 54 of List II and there is no question of the dominant nature test applying. Therefore, when in 2005, **C.K. Jidheesh vs. Union of India** ([2005] 8 SCALE 784) held that the aforesaid observations in Associated Cement were merely obiter and that Rainbow Colour Lab ([2000] 2 SCC 385) was still good law, it was not correct. It is necessary to note that Associated Cement ([2001] 4 SCC 593 ) did not say that in all cases of composite transactions the 46th Amendment would apply."*

15. In the said decision, the Supreme Court has accepted the view expressed by the Apex Court in **Associated Cement's case** . While saying so, it once again reiterated that the decision rendered in **Rainbow Colour Lab's case** has been subsequently overruled by the Apex Court and therefore, the levy of tax in respect of transfer of goods involved in the execution of works contract of the nature of work undertaken by a photographer in taking photographs, developing and printing films is now enforceable.

16. In the instant case, the Tribunal has relied upon what was observed by the Apex Court in ***Associated Cement's case*** and has come to the conclusion that the activity of the petitioner is in the nature of works contract and therefore liable to pay the General Sales Tax Act.

17. In our opinion, the Tribunal has correctly applied the law declared by the Apex Court and has correctly come to the conclusion that the activity of the petitioner is in the nature of the works contract and therefore exigible to tax under the Kerala General Sales Tax Act. In view of the above discussion, we are of the opinion that the orders passed by the Tribunal is in consonance with the law declared by the Apex Court in ***Associated Cement's case*** , which has been confirmed by the Apex Court in **Bharat Sanchar Nigam Ltd vs. Union of India.**

18. In view of the above, the questions of law framed by the assessee require to be answered against the assessee and in favour the Revenue. Accordingly, the revision petition requires to be rejected and it is rejected.

In the facts and circumstances of the case, the parties are directed to bear their own costs.

Consequently, I.A.No. 2227 of 2003 is also dismissed.

Ordered accordingly.

**H.L. DATTU,**
**CHIEF JUSTICE.**

**K.T. SANKARAN,**
**JUDGE.**

**lk/DK.**